

Roberti v Village of New Hyde Park

2008 NY Slip Op 31700(U)

June 11, 2008

Supreme Court, Nassau County

Docket Number: 0945-05/

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X
ANTHONY ROBERTI

Plaintiff,

-against-

THE VILLAGE OF NEW HYDE PARK and
NEWBORN CONSTRUCTION, INC., JAMES K.
HANEY, Individually and in his capacity as an Officer of
NEWBORN CONSTRUCTION, INC.,

Defendant.
-----X

**MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 16
Index No.: 945/05
Motion Seq. No.: 02, 03, 04**

DECISION AND ORDER

Papers Read on this Motion:

- 1. Defendant Village of New Hyde Park’s Motion for Summary Judgment.....02
- 2. Plaintiff’s Affirmation in Opposition.....XX
- 3. Plaintiff’s Motion to Strike Answers.....03
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- 5. Defendant James K. Haney and Newborn Construction Inc.’s Affirmation in Opposition.....XX
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- 8. Plaintiff’s Affirmation in Opposition.....XX

This action for compensatory damages and injunctive relief was commenced in the Supreme Court, Suffolk County, under Index No. 06948/03, by Summons and Verified Complaint, dated March 31, 2003, by Plaintiff Anthony Roberti against Defendants The Village of New Hyde Park (hereinafter “Village”), Newborn Construction Inc. (hereinafter “Newborn”) and James K. Haney (hereinafter “Haney”). Issue was joined on July 23, 2003 by service of a Verified Answer on Defendants Haney and Newborn. Defendant, Village served an Amended Verified Answer with Cross-Claim on April 15, 2004. Plaintiff then served Defendants with a Verified Bill of

Particulars, dated September 22, 2004 and a Supplemental Verified Bill of Particulars dated December 15, 2004. On August 26, 2004, this matter was transferred from the Supreme Court in Suffolk to Nassau, new Index No. 945/05.

Plaintiff is the owner of a residential home located at 812 North Ninth Place in New Hyde Park, on the corner intersection of North Ninth Place and Whittier Avenue. Plaintiff alleges that on or about October 2001, Defendant Village entered into an agreement with the Defendant Newborn to do repair work on the corner of Whittier Avenue and North Ninth Place as part of a public works project that included adding a handicap ramp to the curb. Plaintiff alleges that on or about October 31, 2001 to March 2002, Newborn Construction Inc. performed said repair work "in such an unreasonable manner that it substantially interfered with Plaintiff's right to use and enjoyment of Plaintiff's land."

Plaintiff's first cause of action alleges that the work has resulted in a substantial nuisance by the continual pooling of water in the Plaintiff's driveway when it rains. Plaintiff's second cause of action alleges that "negligent performance of the repair/construction work has resulted in the creation of a tripping hazard in the sidewalk at the Plaintiff's premises together with the health and safety hazard arising from the pools of stagnant water." Plaintiff testified that the work done on the curb had lowered the price of the value of his property, but conceded that he had not conducted an appraisal on his property.

As a result, Plaintiff seeks a judgment against Defendants in the sum of \$100,000.00 in damages for the first cause of action, an additional \$100,000.00 in damages for the second cause of action and an injunction against Defendants from leaving the nuisance condition unabated.

I. Defendants' Motions for Summary Judgment and Dismissal

In Motion sequence 02, Defendant Village moves by Notice of Motion for Summary Judgment, pursuant to CPLR § 3212, dismissing the Plaintiff's Complaint and any cross-claims against the Village on the issue of liability. In Motion sequence number 04, Defendants Haney and Newborn move by Notice of Motion for an order pursuant to CPLR §§ 3211(a)(7), and 3212, dismissing this action on the grounds that the Complaint fails to state a cause of action, or in the

alternative, for an order granting Summary Judgment dismissing Plaintiff's Complaint on the ground that there are no triable issues of fact.

With regards to Motion sequence 02, Defendant Village alleges that the gravamen of the Plaintiff's complaint is that he is merely unhappy with the workmanship on the project performed by co-Defendant Newborn, which is not compensable under the law. Further, the areas complained of including the curb, sidewalk, the utility/curb strip of grass located between the sidewalk and curb line, and a tree located in the grassy utility strip, are all public property. Defendant Village maintains that although there is a duty to maintain the public sidewalks in a reasonably safe condition, there is no duty to maintain the sidewalks in a condition acceptable to the abutting owner. Defendant maintains that there is no claim of damage to the Plaintiff's property, no claim that the Plaintiff was denied access to his property, and no claim that the water was artificially diverted onto the Plaintiff's property.

With regards to Motion sequence 04, Defendants Haney and Newborn make an almost identical argument for Summary Judgment on the grounds that the Plaintiff does not raise any legally cognizable damages to his property. Further, Defendants Haney and Newborn state that although Newborn performed the actual construction on the road, by adding the handicap ramp and repairing the drainage, it was co-defendant Village who commissioned an engineering firm, Dvirka & Bartilucci, to oversee the project and prepare the plans for the work. In addition, Defendants Haney and Newborn allege that neither they, nor the Defendant Village, received any complaints concerning the project during construction or at anytime thereafter.

Defendant Village, partially opposes the Summary Judgment motion by co-defendants Haney and Newborn on the issue of liability. Defendant Village states that because the public works project was conducted by the co-defendants Haney and Newborn, if the Plaintiff is found to have an actionable position, it is due to any defects in the work created by the co-defendants.

In opposition to both motions, the Plaintiff alleges that the Defendants' failure to comply with disclosure requirements and discovery demands, precludes their entitlement to dismissal of the complaint. Plaintiff suggests that the Defendants are working collaboratively in a scheme of delay and obfuscation of records such that the Plaintiff has made a motion to strike their respective answers and for preclusion. In addition, Plaintiff alleges that there are "arguable triable issues of

facts concerning the way the road construction work was done; and the damages which the Plaintiff incurred.”

Pursuant to CPLR § 3212(f) “[s]ummary judgment should be denied as premature where. . . the party opposing the motion has not had an adequate opportunity to conduct discovery into issues within the knowledge of the moving party.” See generally, *Colombini v Westchester County Healthcare Corp.*, 24 AD3d 712, 715 (2d Dept 2005). However, “the mere hope that evidence sufficient to defeat the motion may be uncovered during the discovery process is not enough to defeat a motion for summary judgment.” See *Campbell v City of New York*, 220 AD2d 476, 477 (2d Dept 1995). Instead, the information sought must be “clearly specified in a pending discovery demand” and must be relevant to whether the defendant had “dominion and control over the site of the accident.” *Campbell*, 220 AD2d at 477.

In the instant case, the Court finds that summary judgment against the Plaintiff at this juncture is premature as there have been specific discovery demands made on the Defendants that remain unanswered after several appearances before this Court where Defendants agreed to produce the same. Further, the Court agrees with the Plaintiff that they are entitled to know the parameters of the construction job requirements in order to determine compliance with such requirements and to determine the issue of liability, if any, as between all Defendants.

II. Plaintiff’s Motion to Strike and Preclusion

In Motion sequence number 03, Plaintiff moves by Notice of Petition for an order pursuant to CPLR § 3126 striking the Defendants’ answers, or in the alternative, for an order of preclusion against the Defendants for their willful, contumacious recalcitrance in refusing to comply with disclosure demands and the directives of this Court and for the imposition of sanctions and attorneys fees.

Plaintiff alleges that they have requested the production of certain documents including contract reports, and correspondence running amongst the Defendants and the engineering company of Dvirka & Bartulucci, and have yet to receive them. On May 4, 2006 the parties appeared before this Court for a compliance conference where counsel for the Plaintiff’s were directed by the Court to make a formal discovery demand for such documents. On May 17, 2006,

Plaintiff's made a formal demand for the production of the documentation in a Notice of Discovery and Inspection. On August 5, 2006 and August 28, 2006 the parties again came before this Court for compliance conferences where the Plaintiff informed the Court that the requested documentation had not been produced. On August 28, 2006, Defendants Haney and Newborn informed the Court that the requested documents were in the mail, and Defendant Village informed the Court that the documents would be forthcoming in two weeks.

However, on September 13, 2006, Plaintiffs received correspondence from Defendants Haney and Newborn stating that they could not locate the documentation or that the demands were "unduly burdensome or overly broad." On September 14, 2006, Plaintiffs received correspondence from Defendant Village demanding payment in order to secure the requested documentation which they contend totals 600 pages. Instead, Plaintiff traveled to Defendant Village's offices and reviewed the material which consisted of bonds, bids and contracts requested that numerous be copied. Defendant Village has yet to produce the requested copies.

In opposition, Defendants Haney and Newborn allege that the Plaintiff's demands are "an impermissible fishing expedition in search of material relevant to a cause of action that legally does not exist." Defendants responded to the Plaintiff's request by noting that it could not locate the bid or contract book between the Village and Newborn and otherwise objected to the breadth of the demand, by alleging that it was overly broad.

Generally, in order to invoke "the drastic remedy of striking a pleading, the court must determine that the party's failure to comply with a disclosure order was the result of willful, deliberate, and contumacious conduct or its equivalent." *Shapiro v Kurtzman*, 32 AD3d 508, (2d Dept 2006). In the instant case, the Defendants' failure to comply with the Plaintiff's discovery demands after repeated attempts and appearances before the Court, raises the presumption that this failure to do so was willful. However, because striking a pleading is a drastic remedy, the Court directs all Defendants to comply with the Plaintiff's reasonable discovery demands by producing documentation relating to the contract between the Village and Newborn for the subject road-work, as well as any engineering reports produced by Dvirka & Bartulucci relating to the specific work plans on the site.

As such, it is hereby

ORDERED, that Defendants' motions for Summary Judgment against Plaintiff Anthony Roberti, motion sequence 02 and motion sequence 04 respectively, are **DENIED** without prejudice. It is further,


ORDERED, that all Defendants are to comply with the Plaintiff's reasonable discovery demands as set forth herein, within sixty (60) days of the date of this order,

ORDERED, that the Plaintiff's motion sequence 03 to strike the Defendant's answers and for preclusion is denied without prejudice to a later application.

Any relief not specifically granted herein is **denied**.

This constitutes the **DECISION** and **ORDER** of this Court.

DATED: June 11, 2008
Mineola, N. Y.

ENTER: 
HON. MICHELE M. WOODARD
J.S.C.

ENTERED

JUN 16 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE